89-1231

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID SUIFONG FAN,

Petitioner,

vs.

~~UNITED STATES OF AMERICA,~~
STATE OF MINNESOTA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

DOUGLAS W. THOMSON
DEBORAH ELLIS
THOMSON & ELLIS, LTD.
Suite 300
345 St. Peter Street
St. Paul, MN 55102
(612) 227-0856
Counsel for Petitioner

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED FOR REVIEW

Whether Minnesota Statutes Section 617.246 violates the first and fourteenth amendments by imposing strict criminal liability upon anyone promoting, employing, using or permitting a person under the age of 18 to engage in a sexual performance by precluding a mistake of age defense.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

David Suifong Fan, Petitioner,

vs.

State of Minnesota, Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID SUIFONG FAN,

Petitioner,

vs.

~~UNITED STATES OF AMERICA~~, STATE OF MINNESOTA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Minnesota Court of Appeals, upon which the Minnesota Supreme Court declined further review, is reported at 445 N.W.2d 243 (Minn. Ct. App. 1989), pet. for rev. denied October 31, 1989, and is reprinted in Appendix A. The Minnesota Supreme Court's order denying further review is reprinted at A-9.

JURISDICTON

The judgment of the Minnesota Court of Appeals was filed September 5, 1989. Appendix A. The Minnesota Supreme Court entered its order October 31, 1989 denying petitioner's request for further judicial review. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 United States Code Section 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes Section 617.246 provides in pertinent part as follows:

Subdivision 1. Definitions. (a) For the purpose of this section, the terms defined in this subdivision have the meanings given them.

(b) "Minor" means any person under the age of 18.

(c) "Promote" means to produce, direct, publish, manufacture, issue, or advertise.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following if the depiction involves a minor:

(i) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

(ii) Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(iii) Masturbation or lewd exhibitions of the genitals.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(f) "Work" means an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing.

Subd. 2. Use of minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Any person who violates this subdivision is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000 for the first offense and $20,000 for a second or subsequent offense, or both.

* * *

Subd. 5. Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section.

STATEMENT OF THE CASE

Petitioner was charged in a two count complaint with employing and permitting a person under the age of 18 to engage in a sexual performance in violation of Minnesota Statute Section 617.246, subdivision 2. He was convicted on both counts September 23, 1988, following a jury trial before the Honorable Thomas Mott, Ramsey County District Court.

At all relevant times petitioner was the owner of the Belmont Club, located on University Avenue in St. Paul (T. 152).[1] The Belmont Club was licensed to serve liquor and present live entertainment in the form of nude dancing (T. 27, 38-39, 73). Performers at the Belmont Club danced on a stage surrounded by glass which was located in a corner of the establishment (T. 38-39).

On November 14, 1987, T.M. auditioned with Dancing Angels, an agency that provided dancers to the Belmont Club (T. 139-40). Nancy Osterman was the manager of Dancing Angels and responsible for auditioning and hiring the dancers (T. 143-44). Part of Ms. Osterman's responsibility included determining the applicant's age. Osterman did not hire dancers without obtaining some form of identification indicating the applicant's age (T. 151).

At the conclusion of T.M.'s audition, Osterman asked T.M. for some identification indicating her age (T. 43). T.M. said she had left her identification at home and Ms. Osterman told her to bring it with her when she next returned to the club. T.M. later furnished Ms. Osterman with an identification card indicating that she was 18 years of age (T. 43-44). T.M. began dancing at the Belmont Club in December of 1987 (T. 39-40). T.M. had very limited contact with petitioner, the owner of the Belmont Club (T. 59-60).

On February 8, 1988, a St. Paul police officer went to the Belmont Club to arrest T.M. on a juvenile probation violation (T. 69-72, 94). T.M.

---

[1] "T-X" refers to pages in the transcript of the trial proceedings September 20-23, 1988.

testified that she was fourteen years old on February 8, 1988, the day she was arrested (T. 37). She admitted that at the time of her audition she told Ms. Osterman she was eighteen years old and that she later supplied Ms. Osterman with an identification card indicating that she was eighteen years old (T. 44, 58, 141). Following petitioner's conviction, T.M. told the probation officer who was conducting petitioner's presentence investigation that she was convinced that petitioner did not know that she was under the age of eighteen (T. 290). She told the probation officer that she looked significantly older than she actually was and verified that she had used false identification to be hired (T. 289).

In a related administrative proceeding concerning the effect of the underage dancer upon petitioner's license to operate the Belmont Club, the administrative law judge found that, "[T.M.] looks older than her age and could be mistaken for an eighteen year old." (T. 287).

The jury was instructed that any mistake by petitioner as to T.M.'s age was not a defense to the pending charges (T. 164, 247). During jury deliberations, in response to a question raised by the jurors, the court again instructed the jurors that mistake of age was not a defense (T. 262, 264). Shortly thereafter petitioner was convicted (T. 267).

In a post trial motion filed October 10, 1988, seeking to have the judgment vacated, or judgment of acquittal entered, or a new trial, petitioner cited the unconstitutionality of Minnesota Statutes Section 617.246 as one of the grounds for the relief sought. The trial court denied all petitioner's post trial motions on November 23, 1988 (T. 277) and imposed sentence upon petitioner.

The issue regarding the constitutionality of the Minnesota Statute was again raised in the Minnesota Court of Appeals. That court held that the first amendment does not preclude strict liability under Minnesota Statutes Section 617.246 and the statute does not "substantially" chill first

amendment rights. *State v. Fan*, 445 N.W.2d 247-48 (Minn. Ct. App. 1989). See A-8. Petitioner sought review of the Court of Appeals' decision in the Minnesota Supreme Court and that petition for review was denied. See Appendix B at A-9.

REASONS FOR GRANTING WRIT

Minnesota's statute which imposes strict criminal liability upon anyone who promotes, employs, uses or permits a minor to engage in a sexual performance, by precluding the defense of good faith mistake as to age, violates the first amendment by chilling constitutionally protected expressive conduct and denies the accused due process and fundamental fairness at trial. U.S. Const. amends. I and XIV.

The ruling of the Minnesota Court of Appeals, which was upheld by the state supreme court, that the first amendment does not preclude strict liability and that the "compelling state interest requires toleration of the statute's insubstantial dulling effect," (445 N.W.2d 247-48) conflicts with decisions of this Court and a recent decision of the Ninth Circuit Court of Appeals in which that Court held that the first amendment requires a good faith mistake of age defense to a charge of employing, using, persuading, inducing, enticing or coercing a minor to engage in sexually explicit conduct in a film. *See United States v. United States District Court*, 858 F.2d 534, 542 (9th Cir. 1988).

Nude dancing is expressive conduct protected by the first amendment. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 115, 118 (1972). According to the United States Supreme Court, nude dancing is "within the limits of the constitutional protection of freedom of expression" even if it is "*lewd* or naked dancing." *Id.* (emphasis supplied). By imposing strict liability upon persons who promote, employ, use, or permit nude dancing, the State of Minnesota is placing business owners and managers in a position where they must refrain from hiring

persons to perform nude dancing to avoid the risk of strict criminal liability. Even if the effect of the statute is that owners and managers proceed timidly and only restrict their hiring to those persons who are so obviously past their youth so as not to possibly be 18 years or younger, the effect of the statute is nevertheless chilling on this protected conduct.

A generally recognized tenet of criminal law is that an honest mistake of fact negates criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be. *United States v. Barker*, 546 F.2d 940, 946 (D.C. Cir. 1976). This principle is especially true in first amendment contexts. In *Smith v. California*, 361 U.S. 147 (1959), this Court reversed a conviction under an ordinance prohibiting the possession of any obscene book in a place where books were sold. Noting that the ordinance imposed strict or absolute criminal liability without requiring any element of scienter, the Court declared it invalid under the first and fourteenth amendments because of its potential to inhibit constitutionally protected expression. 361 U.S. at 151.

Observing that "[t]he existence of a mens rea is the rule, rather than the exception to, the principles of Anglo-American criminal jurisprudence," the *Smith* Court acknowledged that a legislature's power to create strict liability criminal offenses is subject to limitations, even when no first amendment freedoms are involved. *Id.* at 150 (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). Distinguishing strict liability in the context of food and drug legislation, the *Dennis* Court commented: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.* at 152-53. According to *Smith*, when freedom of expression is involved, the absence of a scienter requirement "tends to impose a severe limitation on the public's access to constitutionally protected matter." *Id.* at 153.

Fifteen years later, in *Hamling v. United States*, 418 U.S. 87 (1974), this Court affirmed a conviction for mailing obscene material because the constitutionally required element of scienter was satisfied by proof, beyond a reasonable doubt, that the defendant "had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials." *Id.* at 123. Adhering to *Smith*, the *Hamling* Court reiterated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and compensate for the ambiguities inherent in the definition of obscenity." *Id.* (quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966)).

In the related context of prohibiting sales of pornography to minors, the constitutionality of such prohibitions has hinged upon whether they included an age scienter requirement. In *Ginsberg v. New York*, 390 U.S. 629, 643-45 (1968), for example, this Court upheld the constitutionality of an allegedly vague statute prohibiting the sale of "girlie" magazines to minors because the prohibition was expressly limited to sales made "knowingly." The statute involved in *Ginsberg* specifically required knowledge of "the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability . . . if the defendant made a reasonable bona fide attempt to ascertain the true age of the minor." *Id.* at 643-44.

Even in the context of laws prohibiting child pornography, the Supreme Court has made it clear that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765 (1982). Yet, as a federal district court recently recognized, *Ferber* did not address the particular issue of whether an element of scienter pertaining to the minor's age is constitutionally required in prohibitions against child pornography. *See United States v. Kantor*, 677 F.Supp. 1421, 1424 (C.D. Cal. 1987).

In petitioner's prosecution under Minnesota Statutes Section 617.246, not only was the State not required to establish an element of scienter,

but petitioner was precluded from raising the defense of good faith mistake as to age. The holding of the Minnesota courts that this does not violate the first amendment is in direct conflict with the holding of the Ninth Circuit Court of Appeals on an identical issue in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988). The Minnesota Court found the rationale of the Ninth Circuit "instructive" but not controlling. *State v. Fan*, 445 N.W.2d at 247. See A-7.

First, procedurally, in *United States v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987), a federal district court held that due process of law entitles a defendant charged with violating the federal child pornography laws to present evidence supporting a mistake of fact defense, in an effort to prove that he acted on the basis of a good faith, reasonable mistake as to the minor's age. The *Kantor* Court observed that due to the limited scope of such a defense, its recognition would not seriously undermine the deterrent value of the child pornography laws. *Id.* at 1433-34. More importantly, constitutional notions of fundamental fairness require recognition of such a defense. *Id.* at 1434-35.

The government sought a Writ of Mandamus from the Ninth Circuit Court of Appeals in the *Kantor* case and the Ninth Circuit Court affirmed the district court's ruling in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988). The Ninth Circuit Court recognized that although a defendant's awareness of the minor's age is not a constitutionally required element of the federal prohibition against child pornography, the first amendment requires that a child pornography defendant be permitted to raise a reasonable mistake of age defense. *Id.* at 537-38, 542. Observing that the age of the minor "defines the boundary between speech that is constitutionally protected and speech that is not," the issue presented to the court of appeals was whether a child pornography defendant may constitutionally be subjected "to strict liability for misjudging the precise location of that boundary." *Id.* at 538-39.

After acknowledging the inherent fallibility of age determinations, the Ninth Circuit Court concluded that the first amendment precludes the imposition of strict liability in the context of child pornography prosecutions. *United States v. United States District Court*, 858 F.2d at 540-41. Accordingly, the court ruled that the first amendment requires recognition of a child pornography defendant's reasonable mistake of age defense. *Id.* at 542. Like the *Kantor* court, the court of appeals observed that such a defense would not significantly hamper the protection of minors from child pornography. *Id.* at 542-43. Finally, the Ninth Circuit commented: "As to those rare cases where otherwise culpable defendants may be exonerated on the basis of a reasonable mistake of age defense, we can only note that even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees." *Id.* at 543.

Under the rationale employed in *Kantor*, Minnesota Statutes Section 617.246, subdivision 5, violated petitioner's constitutional right to due process of law by preventing him from raising a good faith, reasonable mistake of age defense. U.S. Const. amend. XIV. Under the related rationale employed in *United States District Court*, the Minnesota statutory provision violated petitioner's constitutionally protected freedom of expression. U.S. Const. amends. I and XIV.

The Minnesota Court of Appeals decision, which was left undisturbed by the Minnesota Supreme Court, is in direct conflict with the Ninth Circuit Court's holding that the first amendment requires that the accused be permitted to raise a mistake of age defense in prosecutions under a statute nearly identical to the Minnesota statute at issue here.

CONCLUSION

This petition for writ of certiorari should be granted to review the constitutionality of Minnesota Statute Section 617.246, which strict liability provision conflicts with prior decisions of this Court on first amendment protections generally and the holding of the Ninth Circuit Court specifically in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988).

A decision by this court is necessary to resolve conflicting interpretations of the first amendment protections of the accused in criminal prosecutions involving use of minors in otherwise protected expressive conduct.

Respectfully submitted,

THOMSON & ELLIS, LTD.
DOUGLAS W. THOMSON
DEBORAH ELLIS
Suite 300
345 St. Peter Street
St. Paul, Minnesota 55102
(612) 227-0856

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS

CX-88-2467

Ramsey County — Lansing, Judge

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

Appellant.

Hubert H. Humphrey, III

Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Tom Foley

Ramsey County Attorney

Steven C. DeCoster

Assistant Ramsey County Attorney
Suite 400
350 St. Peter Street
St. Paul, MN 55102

Howard Bass

Thomson & Ellis, Ltd.

Suite 300
345 St. Peter Street
St. Paul, MN 55102

Filed: September 5, 1989

Office of Appellate Courts

SYLLABUS

Minn. Stat. § 617.246, subd. 2 (1986), prohibiting the use of minors in sexual performances, is not substantially overbroad or unconstitutionally vague.

Affirmed.

Heard, considered and decided by Lansing, Presiding Judge, Crippen, Judge, and Thoreen, Judge.*

OPINION

LANSING, Judge

This appeal challenges the constitutionality of Minn. Stat. § 617.246, subd. 2 (1986), which makes it a felony for a person to employ or permit a minor to engage in a sexual performance. Holding that the statute is not facially overbroad or unconstitutionally vague, we affirm the trial court's denial of appellant's post-trial motions.

FACTS

A Ramsey County jury convicted David Fan of employing and permitting 14-year-old T.M. to engage in a sexual performance. The trial judge sentenced Fan to concurrent sentences of a year and a day and stayed execution on specific conditions including a 30-day workhouse sentence.

The convictions arose out of Fan's activities as owner and operator of a St. Paul bar, the Belmont Club, which features nude dancers. He is also an officer and director of Dancing Angels, an agency that provides nude dancers for the Belmont and other local liquor establishments. Dancing Angels is managed by Nancy Osterman who hires the dancers subject to Fan's approval.

Dancing Angels hired T.M., then 13 years old, after an audition before Osterman and Fan. When asked for identification she stated she

---

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

left it at home. She was offered and signed an employment contract without identification and was told to bring identification with her when she returned for work. T.M. later produced an Unbank Card listing her age as 18. The Unbank Card, admitted into evidence, is used for check cashing identification and is obtained by filling out a form for which no documentation is required.

The evidence supporting the jury's determination that T.M. engaged in a sexual performance included the testimony of police officers Lawrence Rogers and Charles Lutchen, who observed T.M. perform at the Belmont on a stage in a corner behind glass and in front of mirrors. The stage is positioned at the same level as a narrow bar that is surrounded by stools where customers sit directly in front of the glass and slip money through narrow slits between the panel of glass. T.M. performed a 20-minute routine that included dancing to three songs.

T.M. performed the first dance with a halter wearing a short mini-skirt which she lifted above her waist as she squatted down very close to the glass revealing her buttocks and pubic area. During the second dance T.M. wore only a halter top and high-heeled shoes and squatted near the glass with her knees spread, thrusting her pelvis and hips forward toward the patrons. In the third song T.M., wearing only her shoes, lay on her back with her knees up and spread apart, raising her hips to thrust her pubic area forward toward the patrons. During both the second and third songs she touched her breasts and pubic area with her fingers and partially inserted one finger into her vaginal area.

The trial court instructed the jury that mistake as to age was not a defense to the charges. After the trial Fan brought post-trial motions challenging the constitutionality of the statute and the court's preclusion of a fact defense based on mistake of age.

ISSUE

Is Minn. Stat. § 617.246, subd. 2 (1986) facially overbroad or unconstitutionally vague?

ANALYSIS

Overbreadth

Fan challenges the constitutionality of Minn. Stat. § 617.246[1] on the grounds that it is overbroad. He asserts that the statute's definitions of sexual performance would prohibit protectible First Amendment expression such as plays and movies addressing incest or pictorial representation in books promoting celibacy as a method of disease prevention.

Although a litigant is normally limited to constitutional challenges based on the facts at issue, a claim of first amendment overbreadth extends to potentially unconstitutional applications of a statute. *New York v. Ferber*, 458 U.S. 747 (1982), *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). This broader scope of review is a necessary counter balance when criminal sanctions restrict the ordinary review process available to determine legally protected expression. *State v. Krawsky*, 426 N.W.2d 875 (1988) (citations omitted).

---

[1] The statute provides, in relevant part:

617.246. Use of minors in sexual performance prohibited.

Subd. 2. Use of minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Subd. 1. Definitions. * * *.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following if the depiction involves a minor:

* * *

(iii) Masturbation or lewd exhibitions of the genitals.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Overbreadth must be substantial before a statute will be declared invalid. If a statute's legitimate reach "dwarfs its arguably impermissible applications," it will not be held facially invalid. *Ferber*, 458 U.S. at 774. This is particularly true when conduct and not merely speech is involved. *Ferber*, 458 U.S. at 770, *Broadrick*, 413 U.S. at 615.

In *Ferber*, the United States Supreme Court, analyzing a similar statute prohibiting distribution of material depicting sexual performances by minors, held the statute was not invalid for overbreadth. The court concluded that the statute permissibly prohibited the use of children as subjects of pornographic materials and that this legitimate application of the statute greatly overshadowed the possibility that the statute might prohibit protected educational, medical, or artistic works involving sexual performances by minors.

We are persuaded that the reasoning in *Ferber* applies. The purpose and language of Minn. Stat. § 617.246 prohibits the use of minors in sexual performances. Although it is marginally possible that the statute could reach a valid first amendment application, the statute does not substantially prohibit constitutionally protected expression. As the *Ferber* court concluded, any actual infringement of first amendment rights which may arise should be addressed on a case by case basis. *Ferber*, 458 U.S. at 775.

Vagueness

Fan also challenges the statute as unconstitutionally vague. He contends the phrase "lewd exhibition of the genitals" in subd. 1(e)(iii) is not sufficiently clear to draw a line between lawful and unlawful conduct, particularly when knowledge of the age of the minor is not an element of the offense.[2]

---

[2] Subd. 5 of the statute provides:

> Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian, nor mistake as to the minor's age is a defense to a charge of violation of this section.

Minn. Stat. § 617.246, subd. 5.

The void-for-vagueness doctrine requires that penal statutes define offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is impermissibly vague if it fails to draw a reasonably clear line between lawful and unlawful conduct. *Smith v. Goguen*, 415 U.S. 566, 574-78 (1974).

This court has previously determined that a criminal statute using the terms "lewdness" and "lascivious behavior" is not void for vagueness. *Mankato v. Fetchenhier*, 363 N.W.2d 76 (Minn. Ct. App. 1985). Fan maintains that proscriptions against "lewd conduct" have been invalidated as insufficiently definite. Whether "lewd" or "lewd conduct" has the required specificity to withstand constitutional challenge need not be readdressed here. The statute at issue uses the word "lewd" followed by the more precise term, "exhibition of the genitals." This identical language was upheld in *Ferber* as sufficiently describing a category of material for proscription. *Ferber*, 458 U.S. at 765. The court stated: "The term lewd exhibition of the genitals is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." *Ferber*, 458 U.S. at 765, *quoting Miller v. California*, 413 U.S. at 25.

Fan claims that any vagueness in the statute is exacerbated by the provision that mistake as to the minor's age is not a defense.[3] The Supreme Court has recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of "mens rea." *Colautti v. Franklin*, 439 U.S. 379 (1979). This pro-

---

[3] Honest belief that child was over the age of majority does not constitute a defense of constitutional dimension. *United States v. Brooks*, 841 F.2d 268, 269 (1988). *Nelson v. Moriarty*, 484 F.2d 1034 (1973). The effect of mens rea and mistake on state criminal law has generally been left to the discretion of the state. *See e.g. Powell v. Texas*, 392 U.S. 514, 535-36 (1968), *Lambert v. California*, 355 U.S. 225, 228 (1957). Minnesota courts have held that denial of opportunity to present a reasonable mistake-of-age defense is not unconstitutional. *State v. Morse*, 161 N.W.2d 609 (1968); *State v. Dombroski*, 145 Minn. 278, 176 N.W. 985 (1920).

ceeds from a concern that the statute may punish "without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-02 (1945).

We agree that intent is important if the statutory standard is uncertain. Here the statute specifically requires that a person subject to its enforcement must *know or* [*have*] *reason to know* that the conduct *intended* is a sexual performance." Minn. Stat. § 617.246, subd. 2 (emphasis added). Intent in this case is specifically required as it relates to the challenged standard of "lewd exhibition of genitals."

The question, simply stated, is whether the term "lewd exhibition of genitals" reasonably gave Fan notice that it was illegal to employ a fourteen year old girl to perform the three dances described. We conclude that the statute gave adequate warning of the proscribed conduct and marked boundaries sufficiently distinct to administer and enforce the law.

Finally, in a challenge that implicates both the first amendment and due process protections, Fan argues that exclusion of mistake of age as a defense seriously chills protected speech. At least one federal circuit court, examining a similar child pornography statute, has determined that the first amendment requires a reasonable mistake of age defense. *United States v. United States District Court for Central District of California*, 858 F.2d 534 (9th Cir. 1988).

Although we find the reasoning of this case instructive, we do not find it controlling. The elements to be considered in balancing the competing interests are not the same. In *Ferber* the court recognized the presentation and production of child pornography bears heavily and permanently on the welfare of children. *Ferber*, 458 U.S. 756. The protection of our young from sexual abuse may be among the most important functions of a civilized society. *United States v. United States District Court*, 858 F.2d at 541. Although the Ninth Circuit court recognizes this compelling interest, it casts the balance in form of protected expression — in that

case production of salacious movies. The statute construed by the Ninth Circuit was silent on the issue of age scienter. Here we have a clearer statement of public policy because the Minnesota legislature specifically excluded the mistake-of-age defense.

Second, the "speech" which might be chilled by this application of the statute involves conduct, rather than pure speech.

> "* * * [T]he states have greater power to regulate non-verbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Koppinger v. City of Fairmont*, 248 N.W.2d 708, 712 (Minn. 1976), *quoting Miller v. California*, 413 U.S. 15, 26 n.8.

See also Broadrick, 413 U.S. at 615.

Employers of erotic dancers must simply direct their energies toward a more thorough investigation of their dancers' ages.[4] Minnesota's compelling state interest requires toleration of the statute's insubstantial chilling effect. We conclude that the first amendment does not preclude strict liability under § 617.246 as it relates to these facts.

DECISION

Minn. Stat. § 617.246 is not facially overbroad because it does not substantially prohibit constitutionally protected expression. Minn. Stat. § 617.246, subd. 2, contains a determinable standard of conduct and is not unconstitutionally vague nor does it substantially chill first amendment rights.

Affirmed.

HARRIET LANSING

August 29, 1989.

---

[4] It is noteworthy that all of the evidence presented or offered showed that Fan engaged in an extremely cursory investigation of age in the present case. The only age identification provided by T.M. was an Unbank Card.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

CX-88-2467

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERFD that the petition of David Suifong Fan for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the request of Eve White to file an amicus curiae brief in the above-entitled matter be. and the same is denied.

Dated: 10-31-89.

BY THE COURT:
PETER S. POPOVICH
Chief Justice

APPENDIX C

MINNESOTA SUPREME COURT

CX-88-2467

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

Appellant.

NOTICE OF APPEAL
TO UNITED STATES SUPREME COURT

Petitioner, David Suifong Fan, hereby gives notice pursuant to Rule 10, United States Supreme Court Rules, that he is appealing from the judgment of the Court of Appeals in *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989) filed September 5, 1989, a case upon which this Court declined further review on October 31, 1989.

Specifically, petitioner appeals from the ruling by the Minnesota Courts that the first amendment does not preclude strict liability under Minnesota Statute Section 617.246. *See State v. Fan*, 445 N.W.2d at 247-48.

Respectfully submitted,

THOMSON & ELLIS, LTD.
By DEBORAH ELLIS
Atty. Lic. No. 14616X
Suite 300 - 345 St. Peter St.
St. Paul, Minnesota 55102
(612) 227-0856

[Filed January 23, 1990 MN Appellate Courts]

No. 89-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID SUIFONG FAN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

HUBERT H. HUMPHREY, III
Minnesota Attorney General
TOM FOLEY
Ramsey County Attorney
By: STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
350 St. Peter, Suite 400
St. Paul, Minnesota 55102
(612) 298-5461
Counsel for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1231

DAVID SUIFONG FAN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OF FACTS

On February 8, 1988, Officer Lawrence Rogers, a member of the St. Paul, Minnesota, Police Department's Vice Squad went to the Belmont Club on the corner of Dale Street and University Avenue in the City of St. Paul at about 10:00 p.m. The Belmont Club was wholly owned by petitioner David Fan. Rogers was in plain clothes and unshaven, his hair not cut, to blend in with the milieu and gain the confidence of the people there. Although not actually "undercover" he didn't want to attract attention as being a vice officer. (T. 70-72, 92-93)

There had been calls from a foster mother and/or relatives to one of the sergeants in vice that a juvenile named Tarah Monn, for whom a runaway warrant from Juvenile Court was

outstanding, was dancing at the Belmont. Rogers entered the bar with a general physical description of Tarah—five feet five inches tall with dark brown shoulder length hair—and sat at the bar and watched the three dancers to determine if she was there. (T. 71-73, 94)

Though Tarah Monn was the first dancer to perform, Rogers watched the set of three to verify that the others did not match Tarah's description. (T. 79, 84-85, 97)

Having been in the Belmont Club before, both on and off duty, Officer Rogers knew that nude dancers performed on a stage in the corner behind glass and in front of mirrors. The square-shaped stage was at the level of a narrow bar that surrounded it with stools where customers could sit directly in front of the glass and slip tips in the form of bills of money through narrow slits between the panels of the glass. (T. 38-39, 73, 77-79) The giving of tips to dancers through the glass was a "very common practice" with every dancer and every song; it was a rarity if no tips were given. (T. 107)

The three dancers assigned to each three-hour segment would each dance a twenty minute routine each hour. Between each of the three or four songs on the juke box the dancer pre-selected, she would retire from the stage and remove an article of clothing. In the number Rogers watched, Tarah Monn performed her first song with a halter and a short mini-skirt on, the second with just a halter, and the third nude excepting her high heeled shoes. (T. 47-48)

The two routines that Tarah danced on the evening of February 8 before her arrest, Tarah described as "nasty dancing" where she ended up nude and moved with her body to the tune of rock music. "I just danced," said Tarah; she received $50.00 in tips through the glass that evening. (T. 47-49)

Officer Rogers observed Tarah during her first song "prance around the stage" wearing a Hawaiian print halter top and miniskirt, the latter of which she lifted above her waist as she squatted down very close to the glass revealing her buttocks and pubic area, and the fact she had no pants on, to the customers at the small bar directly in front of her. (T. 79-80)

The stage was fairly well lit with red-tinted light and Rogers had no difficulty from where he sat forty feet away seeing what was happening on stage. (T. 81)

For the second song, Tarah came out only in halter top and high heeled shoes, having removed the miniskirt. After more strutting around, Tarah came to the glass and squatted with her knees spread, thrusting her pelvis and hips forward toward the patrons. Also during the second and third songs, she touched her breasts and her pubic area with her fingers. (T. 83)

For the third song, wearing only her shoes, Tarah turned her back to the audience and bent at the waist and then faced the audience to squat and again spread her knees wide with pelvic thrusts toward the customers. During the third song, Tarah for the first time lay on her back with her knees up and spread apart and her feet on the floor right at the front glass and raised her hips and thrust her pubic area forward toward the patrons. (T. 83-84)

Rogers left the bar when he had seen the three dancers and advised a uniformed beat officer, Charles Lutchen, to come and make the arrest. (T. 85)

Lutchen arrived at 11:15 p.m. and, after waiting twenty minutes outside, entered to find a dancer who matched the description of the juvenile dancing, asked the bartender and found that her name was "Tarah", and that she had about five minutes left of her dance. (T. 120-122, 126-127)

Lutchen watched Tarah about two minutes before going to the stage door to await her leaving. Tarah, who was nude on stage, bent down at the glass and spread her legs exposing her vaginal area, and fondled her breasts and pubic area, inserting one finger partially into her vaginal area and repeatedly "gyrating" around it. She was then on her hands and feet turned toward the glass with her legs spread and her hips gyrating back and forth and up and down. (T. 122-123, 126)

No one tried to stop Tarah from dancing as she did on February 8. (T. 88-89)

Lutchen, as a beat officer, had been in the Belmont some 150 times over the preceding three years and believed Tarah's nude dancing style was what the dancing typically was in the Belmont, "a general repertory of what the dancers do." (T. 124, 132-133)

Rogers, who had been in the Belmont close to 50 times, agreed that all the dancers exposed their genitals and breasts, but thought Tarah "a bit more aggressive than the norm," with her extreme pelvic thrusts and leg spreads and fondling of her genitals and breasts. (T. 88-89)

Photographs of Tarah taken the night of February 8 at the police station showing how she looked that night were received in evidence. (T. 50-51)

On February 8, 1988, Tarah Dawn Monn had just turned fourteen years old, having been born in Menomonie, Wisconsin on January 17, 1974. She was thirteen when she auditioned for the job on November 14 at the Belmont Club. (T. 37, 39-40, 140) Tarah was living in the Juvenile Detention Center at the time of trial and was to be taken to a group home as soon as she concluded her testimony in court. (T. 37)

Her employment was with Dancing Angels, an entertainment agency owned by petitioner David Fan and managed for him by Nancy Osterman, that furnished nude dancers for his bar, the Belmont, and two other bars. Both Nancy and petitioner were present along with a bartender and waitress at Tarah's audition. "Most of the decision" whether or not to hire dancers was in the hands of Ms. Osterman, but she would comply if petitioner told her not to hire a particular dancer, which he did do "if somebody doesn't look nice." (T. 43, 141-144, 152, 155) He owned the company Dancing Angels and signed all the checks, including one to Tarah Monn found in her purse on her arrest. (T. 86, 151-152)

Tarah lied to Ms. Osterman saying she was eighteen years old and that she had her I.D. at home. At the audition, petitioner said Tarah should bring in her I.D. whenever she came in to work. (T. 57) Actually, she brought in an Unbank card she had obtained by simply filling out a form and presenting no documentation to the Unbank, between the time of her audition and starting work a week or so later. (T. 43-44, 141)

Ms. Osterman said petitioner was not in the Belmont on Monday, February 8, his day off (T. 144), although petitioner testified at a license hearing that he worked at the Belmont from 10:30 a.m. to 6:30 p.m. and also from 10:00 p.m. to closing seven days a week. (T. 170-171) Petitioner also admitted he was present when Tarah Monn was auditioned and hired as a dancer. (T. 170)

Tarah saw that petitioner was present on many occasions when she danced, and the way she danced on February 8 was no different from the way she danced these other times. (T. 52, 59) When she came into the bar for pop or cigarettes, he ordered her out as being too young. (T. 60)

STATEMENT OF THE CASE

On April 29, 1988, petitioner David Suifong Fan was by complaint charged with two counts of use of a minor in a sexual performance in violation of Minn. Stat. § 617.246, Subds. 2 and 1(d) and (e), which are reproduced in the Petition at pp. 2-3. He was alleged to have employed (Count I) or permitted (Count II) Tarah Monn, a person under the age of 18 years, to engage in a sexual performance, having reason to know the conduct was a sexual performance; including masturbation and lewd exhibition of her genitals.

Commencing on September 20, 1988, appellant was tried to a jury of twelve, the Honorable J. Thomas Mott, Judge of District Court, State of Minnesota presiding, and on September 23, 1988 he was found guilty as charged.

On November 23, 1988 the Court denied appellant's motion for judgment of acquittal or, in the alternative, for a new trial which he through counsel had made alleging that: the statute under which he was convicted was vague, overbroad and provided for strict criminal liability—since it failed to contain a requirement the State prove the accused knew he was employing a minor, or to permit a defense that appellant had done everything he reasonably could to determine whether the victim was in fact under age.

The trial Court denied the motion in all regards, (T. 277) the Court specifically noting "that various evidence was submitted as to age and how Mr. Fan inquired into the age of the juvenile involved here and to what degree. And that there was evidence submitted to the Court on that very issue, albeit something less than might be the case had there been an affirmative defense to be presented.

"But it's also my recollection that there was not any offer of proof nor any evidence that Mr. Thomson [defense counsel] had tried to introduce as to that issue that was objected to and that objection sustained. That's the court's recollection. I may be mistaken in that. The record will clarify that.

"Based upon memoranda that have been submitted and the arguments of Counsel, the court's review of those as well as the cases submitted, I am at this time going to deny the defense motions in all regards and would propose to proceed to sentencing at this time." (T. 277)

The record does not reflect that petitioner requested an instruction on mistake of fact as an affirmative defense or that, before or during trial, he raised the issue of the constitutionality of the statute under which he was prosecuted.

Judge Mott stayed execution of the year and a day sentence, and put petitioner on probation for five years on condition, among others, that he serve 30 days in the workhouse.

He appealed to the Minnesota Court of Appeals which by opinion filed September 5, 1989 and reported at 445 N.W.2d 243 (Minn.App. 1989), affirmed his conviction. The Minnesota Supreme Court denied review on October 31, 1989.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Based on the evidence received at trial, the elements of the crimes charged were proved beyond a reasonable doubt.

Petitioner did employ or permit Tarah Monn to engage in a sexual performance, to wit: masturbation or lewd exhibition of the genitals, with reason to know her dance was so oriented.

He was sole owner of Dancing Angels that furnished nude dancers to perform at the Belmont Club, which he too owned,

and other bars featuring nude dancers. He was present at the audition at which Tarah was hired. Although he employed one Nancy Osterman as manager of the Dancing Angels, appellant as owner was ultimately in charge; he signed all the checks and could and did veto the hiring of a dancer whose appearance he did not like.

The type of "nasty dancing" performed by Tarah was typical of all the dancers who appeared at the Belmont Club, according to the police officer who had been in there most often and, according to the other officer, like in kind but just a little more aggressive than that the other dancers displayed. Though Tarah's knees were spread particularly wide apart, both officers agreed *all* the dancers "lewdly" exhibited their genitals. The way the stage and bar in front of the glass were set up—with the patrons' heads at leg-calf level facilitated focusing on the genitals of the dancers; this was accentuated when they spread their knees wide apart and with their pelvises thrust their genitals toward the audience a couple of feet away.

Even if the type of masturbation or touching of her own genitals Tarah practiced was beyond the norm, appellant was on notice that her performance featured lewd exhibitions of her genitals. Tarah testified that she danced on the night of her arrest in just the same manner she danced on all other nights at the Belmont.

Indeed, lewd exhibition of the genitals was the purpose of all dancing done at the Belmont—to sexually excite customers and induce them to push tips through the glass and return again to patronize the establishment.

In short, the jury could readily infer that appellant had reason to believe Tarah's performance was a sexual performance even though he may not have been present during the

particular dances observed by police on February 8 or have known in what precise rotation she was dancing.

This Court's landmark decision in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) upheld a statute very similar to that at issue in the instant case against constitutional attack on a broad front. The Court recognized the strong policy considerations supporting the eradication of child pornography by the states and the federal government.

In holding that child pornography was not entitled to First Amendment protection, this Court equated it to the sexual abuse of children; indeed it can be argued that child pornography is worse because of its public nature and, in the case of photographic or filmed materials, because it has a longer, more pervasive, impact on the child.

The operative term in the Minnesota Statutes, "lewd exhibition of the genitals," is identical to that in the New York Statute approved in *Ferber*.

Since the activity sought to be prohibited is conduct-related and not under the umbrella of free expression contained in the First Amendment, overbreadth scrutiny is limited; *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."

Numerous authorities support the proposition that the phrase "lewd exhibition of the genitals" is neither impermissibly vague nor overbroad. *United States v. Nemuras*, 567 F. Supp. 87 (D.C. Md. 1983), *aff'd* 740 F.2d 286 (4th Cir. 1984); *United States v. Weigand*, 812 F.2d 1239 (9th Cir. 1987); *State v. Shingaki*, 648 P.2d 190 (Hawaii 1982).

Appellant cannot hide behind "serious artists" who claim that, to create an expose' of children dancing nude, they must visually depict such dances themselves. The substantial overbreadth standard of *Broadrick* is not approached. That is, an accused may not assert the fact that a negligible number of instances of protected expression might run afoul of the statute where *his* conduct is clearly *not* protected expression at all.

Ferber goes on to hold (458 U.S. at 764, 102 S.Ct. at 3358):

> "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)."

Contrary to petitioner's claim, the statute here in question does not create strict liability, but requires that the State establish scienter.

In satisfaction of this requirement, the Minnesota statute (§ 617.246, subd. 2) requires proof that the accused knew or had reason to know the performance would be sexual as that term is defined. *Hamling v. United States*, supra.

What suffices is proof that the accused can fairly be charged with knowing that "the nature and character" of the performance was sexually explicit. *United States v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987); *United States v. Fenton*, 654 F. Supp. 379 (E.D.Pa. 1987); *United States v. Merchant*, 803 F.2d 174 (5th Cir. 1986).

There is not an additional provision that the accused know the performer is under age—too burdensome in cases where the identity of the child who appears in photos or on film may well be unknown—or that the accused may avoid guilt by

showing mistake as to the age of the performer. That the language of the Minnesota statute (§ 617.246, subd. 5) forbids such a defense is in accord with most other crimes of criminal sexual misconduct committed against children.[1]

The issue is entirely different when one considers restrictions on the dissemination or exposure *to children* of non-obscene pornography. There regulations must be carefully drawn lest there be a chilling effect on the availability of protected expression to adults. Compare *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) and cases cited in *Ferber*, 458 U.S. at 754-755, 102 S.Ct. at 3353.

The provisions on exposure of minors to sexually provocative material—where there could be a chilling effect on the availability of protected expression to adults—permits a mistake of fact defense "if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor." Minn. Stat. § 617.292, subd. 8(2).

Patrons of establishments like the Belmont Club, in spite of the law proscribing child pornography, may still view nude dancers and nude dancers may perform. The only inhibition is on the bar owner who must be extremely careful that the nude dancers he hires are in fact of sufficient age. Indeed the restriction is content-neutral in that it forbids no class of performance at all—only the use of children as performers.

---

[1] Solicitation of children to engage in sexual conduct like prostitution negatives a mistake of fact defense respecting the age of the child. Minn. Stat. § 609.352, subd. 3. Criminal Sexual Conduct provisions, with two exceptions, uniformly deny the mistake as to age defense. (First Degree), Minn. Stat. §§ 609.242, subds. 1(a), (e), (f) and (g); (Second Degree), § 609.343, subds. 1(a), (b), (g) and (h); (Third Degree), § 609.344, subds. 1(a), (e), (f) and (g); and (Fourth Degree), § 609.345, subds. 1(a), (e), (f) and (g). *Contra*: Minn. Stat. § 609.344, subd. 1(b) and § 609.345, subd. 1(b). The validity of these provisions has not been questioned.

As a matter of law, appellant would not have available a mistake of fact defense on the facts in evidence in this case. Tarah Monn was hired on her own representation she was over 18 and that her I.D. was "at home"; she was instructed to bring in the I.D. later and in order to "comply" she received, on her application alone and without other verification, an UNBANK card that said she was 18. This "proof" she submitted to the Belmont was no better than her personal claim.

In addition, while it is true that the first amendment forbids a blanket prohibition on nude dancing, nudity is not in all contexts protected. It would be unlawful in Minnesota to employ even adult dancers to masturbate or lewdly exhibit their genitals, so long as the State could demonstrate that the additional criteria of obscenity contained in the Roth-Miller formulation[2] were present. See Minn. Stat. § 617.241, subd. 1; *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

---

[2] Minn. Stat. (1987), § 617.241, subd. 1(a) amended in manner not here relevant by Minn. Laws of 1988, chapter 406, effective June 1, 1988.

(a) "Obscene" means that the work, taken as a whole, appeals to the prurient interest in sex of the average person, which portrays patently offensive sexual conduct and which, taken as a whole, does not have serious literary, artistic, political, or scientific value. In order to determine that a work is obscene, the trier of fact must find:

(i) that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex of the average person;

(ii) that the work depicts patently offensive sexual conduct specifically defined by clause (b); and

(iii) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The conjectural chilling effect on protected expression through application of Minn. Stat. § 617.246 to petitioner's conduct here is far outweighed by the strong governmental interest in protecting children, even though they are precocious, from exploitation in child pornography.

CONCLUSION

Wherefore respondent State of Minnesota prays the Court deny the petition for Writ of Certiorari in the instant case.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Minnesota Attorney General
TOM FOLEY
Ramsey County Attorney
By: STEVEN C. DeCOSTER
Assistant Ramsey County
Attorney
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-4421
Attorneys for Respondent
Atty. Reg. No. 21787

Dated: February 13, 1990